

II. BACKGROUND

2. In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). This enactment added a new Section 335 of the Communications Act of 1934, which directed the Commission to adopt rules imposing public interest programming and other requirements on DBS providers.⁴ Pursuant to this statutory mandate, the Commission implemented public interest programming rules.⁵ These rules require DBS providers to set aside four percent of their DBS system's total channel capacity exclusively for programming of an educational or informational nature.⁶ In addition, the statute provides that DBS providers may not charge rates that exceed 50 percent of costs directly related to making the capacity available to qualified programmers.⁷ Further, pursuant to the *DBS Public Interest Obligations Order*, DBS providers are permitted to use a "clearinghouse of educators and public interest specialists to choose among qualifying programs that would be aired on the set-aside capacity."⁸ The programming covered by these rules must be in place by December 15, 1999.⁹

3. ADEC is a consortium of 58 state and land grant colleges and universities that pool resources to develop distance education programs for the K-12 level, as well as credit and non-credit college and graduate level courses.¹⁰ ADEC seeks access to EchoStar's public interest set-aside channels. EchoStar is a DBS provider with over 3 million subscribers.¹¹ EchoStar is authorized to operate at five orbital locations.¹² It presently is providing 350 broadcast channels from two satellites at 119° W.L., a full-CONUS orbit location.¹³ EchoStar also offers specialty and niche programming from its satellite at

⁴ 47 U.S.C. § 335.

⁵ Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, *Report and Order*, 13 FCC Rcd 23254 (1998) ("*DBS Public Interest Obligations Order*").

⁶ 47 C.F.R. § 100.5(c).

⁷ 47 U.S.C. § 335(b)(4), *see also* 47 C.F.R. § 100.5(c)(5)(B).

⁸ *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23300.

⁹ 47 C.F.R. § 100.5(c)(7).

¹⁰ American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint, at 2, File No. SAT-PDR-19990803-00077 ("*ADEC Request*").

¹¹ *See* EchoStar Press Release dated October 7, 1999 at www.dishnetwork.com/profile/press/press/press245.htm.

¹² EchoStar is authorized to operate on channels at 110° W.L., 119° W.L., 148° W.L., and 61.5° W.L. EchoStar also has a channel assignment to operate 22 channels at the 175° W.L. orbit location but is not providing service at the present time. EchoStar recently launched EchoStar V, which will operate at 110° W.L. and provide 150 broadcast channels with full-CONUS coverage. *See* EchoStar Press Release dated October 6, 1999 at www.dishnetwork.com/profile/press/press/press244.htm.

¹³ *See* EchoStar Press Release dated July 19, 1999 at www.dishnetwork.com/profile/press/press/press212.htm.

61.5° W.L., which is not a full-CONUS orbit location and therefore does not reach subscribers in all 48 continental states and Alaska and Hawaii.

4. EchoStar intends to place all of its DBS public interest programming on its satellite, EchoStar III, at the 61.5° W.L. orbit location.¹⁴ ADEC asserts that because EchoStar III does not provide coverage to western portions of the United States, EchoStar's proposal violates the *DBS Public Interest Obligations Order* requirement that such programs be made available to "all subscribers."¹⁵ On August 3, 1999, ADEC filed its Request, asking the Commission to rule that the DBS public interest obligations require EchoStar to provide channel space on a satellite with full coverage of the United States and which can be received by subscribers without having to purchase additional equipment or incur additional expenses.¹⁶ ADEC also asks the Commission to limit the monthly access fee EchoStar may charge ADEC to \$1,970 until EchoStar justifies a higher rate, and that ADEC be permitted to negotiate directly with EchoStar and not its third party agent, Educating Everyone.

5. EchoStar filed an opposition to this request and ADEC replied. In addition, twenty-three organizations, including other public interest programmers, filed letters and comments in this proceeding.¹⁷ All of the comments support ADEC's request and urge the Commission to require EchoStar to provide public interest programming on a nationwide basis. In sum, the commenters state that access to all subscribers is critical, and express concerns that educational programming will not reach target populations located throughout the United States. In addition, the commenters agree with ADEC that EchoStar's proposed monthly access fee is excessive and cost prohibitive. Several commenters also noted that ADEC should be permitted to deal directly with EchoStar for access and not through an agent.

6. In a letter dated September 23, 1999, the International Bureau requested additional information from EchoStar relating to ADEC's Request. Specifically, the Bureau asked for information regarding: 1) the number of subscribers receiving service from EchoStar III; 2) an itemized justification of its proposed monthly access fee for public interest programmers; and 3) information regarding whether its agent, Educating Everyone, would be charging programmers a fee for its services, and if so, what amount. EchoStar submitted this information on October 7, 1999.¹⁸

¹⁴ See *ADEC Request* at 4, and *Opposition of EchoStar Satellite Corporation*, Filed August 27, 1999, at 2 ("*EchoStar Opposition*").

¹⁵ *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23285 (1998) ("[T]he public interest programming provided for in this order must be made available to all of a DBS provider's subscribers without additional charge.").

¹⁶ *ADEC Request* at 9. Section 1.41 of our rules allows for informal requests for agency action where the form for requesting relief is not otherwise provided in the rules. 47 C.F.R. § 1.41.

¹⁷ List of Commenters attached as Appendix A.

¹⁸ See *Response of EchoStar Satellite Corporation to Request for Information*, filed October 7, 1999 ("*EchoStar Response*"). EchoStar submitted this information subject to a request for confidentiality under 47 C.F.R. §§ 0.457 and 0.459.

III. DISCUSSION

7. *DBS Public Interest Coverage Requirements.* ADEC states that Section 335(b)(3) of the Communications Act requires EchoStar to allocate transponder space for its public interest programming on a satellite available to “all [] subscribers without additional charge.”¹⁹ In claiming that EchoStar is violating this directive, ADEC asserts that EchoStar III does not provide coverage to substantial parts of the western United States and, consequently, EchoStar subscribers in the western portions of the United States would not receive any public interest programming.²⁰ Second, because all of EchoStar’s subscribers receive their core programming from satellites at 119° W.L., subscribers within the coverage area of EchoStar III would be required to purchase a second receiving antenna in order to receive public interest programming. ADEC asserts that such a purchase requirement would violate the *DBS Public Interest Obligations Order* which states that programming must be provided to subscribers at no additional charge.²¹ In addition, ADEC states that some of its members would not be able to receive the programming, and even if members with main campuses are able to receive programming, it would be impossible to deliver the programming to their remote learning and extension centers and home-based students in an affordable manner.²²

8. In its opposition, EchoStar acknowledges that EchoStar III is technically not a full-CONUS satellite, but asserts that it can be accessed by a “vast majority” of EchoStar’s subscribers.²³ Nonetheless, EchoStar continues that there is nothing in the Cable Act suggesting that the Commission may dictate “which” capacity a DBS provider must set aside. Further, EchoStar argues, nothing in the rulemaking, the *DBS Public Interest Obligations Order*, or the Commission’s rules suggests that the Commission considered imposing restrictions on the ability of DBS providers to decide which satellites to use to fulfill their public interest obligations.²⁴ EchoStar states that had the Commission raised this possibility it would have submitted comments addressing the technical and economic implications, as well as the statutory basis of such a requirement. According to EchoStar, to now require DBS providers to reserve programming on particular satellites would violate the Administrative Procedure Act (“APA”).²⁵ Rather, EchoStar asserts that the *DBS Public Interest Obligations Order* states that DBS providers must set aside four percent of the “total” number of programming channels on all of its satellites, and intended to give DBS licensees “considerable flexibility” in deciding which part of their satellite constellation to deploy toward meeting the requirement.²⁶ EchoStar maintains that the statement in the *DBS Public Interest Obligations Order* that public interest programming “must be made available

¹⁹ *ADEC Request* at 3, citing *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23285.

²⁰ *ADEC Request* at 5.

²¹ *Id.*, citing *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23285.

²² *Id.*

²³ *EchoStar Opposition* at 3.

²⁴ *Id.* at 4-5.

²⁵ *Id.* at 7-8.

²⁶ *Id.* at 5.

to all of a DBS provider's subscribers without additional charge" is "ambiguous at best."²⁷ Further, to comply with ADEC's request, EchoStar states that it would have to set aside duplicative capacity on more than one satellite, exceeding the four percent set-aside because no one satellite is capable of providing service to all subscribers. EchoStar states such a result would disrupt business decisions and adversely affect a DBS provider's flexibility to allocate transponder capacity in a manner that optimizes the use of its satellites.²⁸

9. EchoStar also states that ADEC ignores the distinction between "cost of equipment" and "cost of service" in asserting that "no additional charges" means subscribers should not have to purchase equipment or incur additional costs.²⁹ While there would be no additional charge to receive the public interest programming, subscribers would still have to purchase the equipment necessary to receive the service from EchoStar III. EchoStar claims that equipment would have to be purchased regardless of the programming package provided to the subscriber, whether it be from 119° W.L. or 61.5° W.L. According to EchoStar, under ADEC's reasoning a subscriber could elect to receive programming only from EchoStar III and not be required to purchase any equipment because it would be an "additional charge" for access to the public interest programming.³⁰

10. We find that EchoStar's proposal to place all of its public interest programming on EchoStar III at 61.5° W.L. does not comply with the requirements of the Commission's DBS public interest rules. In the 1992 Cable Act, Congress directed the Commission to require DBS providers to reserve a portion of their channel capacity to be made available to national educational program suppliers for noncommercial programming of an educational or informational nature.³¹ In implementing these obligations, the Commission made clear that "the public interest programming provided for in this order must be made available to *all* of a DBS provider's subscribers without additional charge."³² The Commission also stated that "public interest obligations are designed to expand programming choices for consumers in *all* areas of the United States," and set forth its expectation that public interest programming "will contribute to enhanced viewing opportunities for consumers throughout the United States."³³ Indeed, in establishing DBS in 1982, the Commission stated that the service offers "unique public benefits on a national scope ... and that the primary coverage area for DBS is national."³⁴

²⁷ *Id.* at 7.

²⁸ *Id.* at 10-11.

²⁹ *Id.* at 11.

³⁰ *Id.* at 12.

³¹ 47 U.S.C. § 335 (b).

³² *Report and Order*, 13 FCC Rcd at 23285 (emphasis added).

³³ *Id.* at 23356 (emphasis added).

³⁴ *Id.* at 23278 (citation omitted). *See also*, Fifth Annual Report, Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, 14 Comm. Reg. (P&F) 0923 (1998) (with the enactment of DBS public interest obligations, the Commission anticipates that a variety of programming will soon be available, including major university projects shared nationwide and health applications developed for rural America).

11. EchoStar III does not have the technical capability to reach all of EchoStar's subscribers. Although EchoStar claims in this proceeding that the EchoStar III footprint covers the entire U.S. as well as Puerto Rico and the U.S. Virgin Islands, elsewhere it represents that the satellite coverage is from Denver to the east coast.³⁵ Furthermore, in previous proceedings before the Commission, EchoStar opposed designating 61.5° W.L. as a full-CONUS location.³⁶ EchoStar's own subscriber information fails to support its claim that a "significant number of subscribers" in the Pacific Northwest receive service from its satellite at 61.5° W.L.³⁷

12. Finally, allowing EchoStar to fulfill its public interest obligations from EchoStar III would require the substantial majority of its subscribers within the reception range to purchase a second receiving antenna to receive this programming. The supplemental information submitted by EchoStar indicates that the number of subscribers receiving service from EchoStar III, either alone or in conjunction with service from 119° W.L., is *de minimis* in relation to its total subscriber base.³⁸ While we do not reach the issue of whether the purchase of a second dish constitutes an additional charge, we find that it would be contrary to the Commission's purpose in implementing public interest programming obligations to allow a DBS provider to allocate this programming exclusively to a satellite received by a small percentage of its total subscribers. EchoStar is correct that the Commission intended to provide DBS operators the flexibility to implement their public interest obligations, but this flexibility does not allow EchoStar to exclude subscribers in western portions of the United States or in Alaska or Hawaii where EchoStar has the capability to provide public interest programming to these subscribers from other satellites.

13. Although we find that EchoStar's proposal does not satisfy its public interest obligations, we note that directing EchoStar to put all of its public interest programming on one particular satellite would be contrary to our intent to give DBS providers the flexibility to implement this obligation. Although the vast majority of EchoStar subscribers receive service from EchoStar's 119° W.L. orbit location, EchoStar represents that certain of its subscribers receive service only from 61.5° W.L.³⁹ In order to balance the technical capabilities of EchoStar's DBS system with the requirement that

³⁵ See EchoStar website at www.dishnetwork.com/profile/sat.htm.

³⁶ The Commission found, as EchoStar asserted, that 61.5° W.L. did not qualify as a full-CONUS orbit location. Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Rcd 9712, 9727, 9742 (1995). See Joint Comments of EchoStar Satellite Corporation and DirectSat Corporation, IB Docket No. 95-168, PP Docket No. 93-253 at 47, filed November 20, 1995 ("[The 61.5° W.L.] orbital location does not qualify as a full-CONUS DBS slot either from an engineering or marketing standpoint.... As a result of the low look angles and the concomitant increase in rain attenuation, a significant portion of the population in [a substantial part of the western United States] will be incapable of receiving DBS service from 61.5° W.L. This will in turn clearly inhibit the marketing of service from this location.")

³⁷ *EchoStar Response*, Appendix B.

³⁸ *Id.*

³⁹ *Id.* We note that these subscribers have elected to receive this specialized programming only. These subscribers may receive service from EchoStar's satellites at the 119° W.L. orbit location with the purchase of a second receiving antenna.

programming be provided to all subscribers, we find that EchoStar must, at a minimum, reserve four percent of the total number of channels available at each of its full-CONUS orbit locations for public interest programming. Because our rules require a DBS provider to reserve four percent of its *system's* total channel capacity for qualified public interest programmers, the total number of set-aside channels may exceed four percent of the full-CONUS channels.⁴⁰ Thus, EchoStar may place these remaining channels (i.e., public interest channels in excess of four percent of its full-CONUS channels) on satellites at either its full-CONUS or non full-CONUS locations, whichever it deems the most efficient and cost effective.⁴¹ As set forth in the *DBS Public Interest Obligations Order*, if the four percent calculation creates any fraction of a channel, DBS providers must round the calculation upward.⁴² Any channels resulting from this calculation must be placed at a full-CONUS location. We find this result provides the greatest benefit to the vast majority of EchoStar's subscribers who will be able to receive public interest programming without purchasing additional equipment.

14. We recognize, however, that if EchoStar elects to place some of the public interest programming on a satellite that is not at a full-CONUS location, those channels at full-CONUS locations will be more desirable for certain public interest programmers. Therefore, we require EchoStar to provide space for qualified public interest programmers at the location of their choice, if space is available. Consequently, if a public interest programmer requests space on a full-CONUS satellite, EchoStar cannot place the programming on its satellite at 61.5° W.L. if four percent of the full-CONUS channels are not being used for public interest programming.

15. This decision does not raise APA concerns because we are not, as EchoStar asserts, placing new restrictions on the manner in which DBS providers must fulfill their set-aside obligations. Rather, we are simply interpreting the rules adopted in the *DBS Public Interest Obligations Order* and providing further guidance concerning the scope of EchoStar's clear obligation under those rules to provide public interest programming to *all* of its subscribers. Nor does the record support EchoStar's claim that the parties were not adequately apprised of the issues being considered by the Commission. The parties were on notice that the Commission was considering all relevant issues related to how best to implement the Congressional directive to adopt public interest rules for DBS. In fact, EchoStar specifically commented on the issue it now claims we did not raise in the DBS public interest obligation proceeding.⁴³

⁴⁰ 47 C.F.R. § 100.5(c)(1).

⁴¹ Thus, for example, if EchoStar's DBS system has 400 total channels, it must set aside 16 channels for public interest programming. If it has 300 channels at full-CONUS locations, it must set aside 12 of these channels for public interest programming. The remaining 4 channels may be placed on satellites at either full-CONUS or non full-CONUS locations.

⁴² *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23285.

⁴³ See Reply Comments of EchoStar Communications Corporation in MM Docket 93-25, Filed May 30, 1997, at 3 ("Each DBS provider should be allowed to satisfy the set-aside requirement through any combination of spectrum and/or orbital resources. Section 25 does not require, for example, that capacity be reserved at a 'full-CONUS' location.").

16. *Monthly Access Fee.* EchoStar has proposed charging ADEC a monthly access fee of \$10,000 per month.⁴⁴ ADEC states that EchoStar refused to provide a justification of its proposed fee, but that its own analysis indicates that a monthly fee of \$1,970 is more accurate and reasonable. In response to the Bureau's request, EchoStar submitted an itemized list detailing the costs of its proposed monthly fee subject to the Commission's rules on confidentiality.⁴⁵

17. Section 335 of the Communications Act requires that DBS providers make their public interest channel capacity available to national educational programming suppliers upon reasonable prices, terms and conditions.⁴⁶ It also states that such costs shall not exceed 50 percent of the total direct costs of making such channel available.⁴⁷ In determining reasonable prices, Congress directed the Commission to take into account the non-profit character of the public interest programmers.⁴⁸ In implementing Section 335, the Commission concluded that costs must be directly related to making the capacity available for noncommercial programmers and may include certain incremental costs for equipment and labor. Specifically, the Commission stated that such costs may include incremental labor required for traffic management at the uplink facility, incremental compression equipment, incremental labor required to authorize viewers to receive particular programming and any backhaul costs actually incurred by the DBS provider in order to transmit the noncommercial or educational programming.⁴⁹

18. At this time, we do not have enough information in the record to determine the reasonableness of EchoStar's proposed fees. At a minimum, as a party to this proceeding, we find that ADEC is entitled to review and respond to EchoStar's cost statement. Therefore, we will release the information EchoStar has submitted thus far to ADEC, subject to our standard protective order, Attachment B hereto, unless EchoStar files an application for review of this determination within 5 business days of the release of this Order.⁵⁰ We direct ADEC to file any response within 14 days of receiving access to EchoStar's data. EchoStar may file a reply within 10 days thereafter, and ADEC may have 5 days to address EchoStar's reply. We further instruct EchoStar to share with ADEC any additional confidential information it files subject to the same protective order. We strongly encourage the parties to work together to resolve their dispute. Finally, given the possibility that the rate issue may not be resolved by December 15, 1999, the date the programming must be in place, we are placing an accounting order into effect so that ADEC will be entitled to a refund of any amount it pays that we later determine to be unreasonable. Accordingly, until this issue is resolved, EchoStar must keep records of all funds it receives from ADEC as well as all expenses it incurs in carrying ADEC's programming.

⁴⁴ *ADEC Request* at 6.

⁴⁵ *See* note 18, *supra*.

⁴⁶ 47 U.S.C. § 335(b)(3).

⁴⁷ 47 U.S.C. § 335(b)(4)(B).

⁴⁸ 47 U.S.C. § 335(b)(4)(A).

⁴⁹ *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23308. *See also*, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 294, 295 (1992).

⁵⁰ 47 C.F.R. § 0.459.

19. *Use of a Third Party Agent.* EchoStar proposes to use a third party, Educating Everyone, to act as its agent in fulfilling its public interest obligations. ADEC complains that it should not be required to negotiate with Educating Everyone because this will add an additional layer of costs. Further, because Educating Everyone is acting as both a programmer and a middleman it has, according to ADEC, an inherent conflict of interest. EchoStar responds that Educating Everyone will not charge qualified programmers any type of fee or markup for the service it provides. EchoStar also states that while it is directly responsible for fulfilling its public interest obligations, the *DBS Public Interest Obligations Order* explicitly authorizes DBS providers to delegate the administration of this obligation. In its reply, ADEC submitted evidence that the issue of costs for Educating Everyone's services has not been resolved.⁵¹ In response to the Bureau's request, EchoStar states that Educating Everyone will be prohibited from charging qualified noncommercial programmers any type of mark-up, fee or commission for its services.⁵²

20. The *DBS Public Interest Obligations Order* establishes the responsibility of DBS providers to ensure that the obligations imposed by the statute are fulfilled.⁵³ However, it also permits DBS operators to use a consortium or clearinghouse of "educators and public interest specialists to choose among qualifying programs that would be aired on the set-aside capacity."⁵⁴ Educating Everyone is a non-profit consortium of public interest specialists. Contrary to ADEC's concerns about conflict of interests, we stated that such a clearinghouse would have the "greatest benefit to the public if it is composed of diverse members including educators [and] nonprofit programmers."⁵⁵ Furthermore, EchoStar represents that Educating Everyone will not charge public interest programmers a fee for its services, resolving ADEC's concern regarding increased costs. As long as Educating Everyone selects qualified educational and informational programming as set forth in our rules we find no reason to preclude EchoStar from using its services. We reiterate, however, that EchoStar retains the ultimate responsibility for complying with the statute; that responsibility cannot be delegated away.

IV. CONCLUSION

21. Based on the foregoing, we find it is in the public interest to grant, in part, the American Distance Education Consortium's Request for an Expedited Declaratory Ruling and Informal Complaint.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the Request for an Expedited Declaratory Ruling and Informal Complaint, filed by the American Distance Education Consortium, File No. SAT-PDR-19990803-00077, IS GRANTED, IN

⁵¹ Response to Comments from American Distance Education Consortium, Declaration of Cheryl A. Leanza, Attached.

⁵² *EchoStar Response*, Attachment C, Declaration of David K. Moskowitz.

⁵³ *DBS Public Interest Obligations Order*, 13 FCC Rcd at 23300.

⁵⁴ *Id.*

⁵⁵ *Id.*

PART, and that EchoStar must, at a minimum, reserve four percent of the total number of channels available at its full-CONUS orbit locations for public interest programming. EchoStar may place the remaining number of public interest channels on satellites at either its full-CONUS or non full-CONUS locations. EchoStar shall provide space for public interest programmers at the orbit location of their choice subject to availability.

23. IT IS FURTHER ORDERED, that the American Distance Education Consortium's request that EchoStar's monthly access fee be limited to \$1,970 until EchoStar justifies a higher cost IS DENIED. EchoStar shall provide its itemized cost information to the American Distance Education Consortium for review and comment subject to the attached protective order. EchoStar has 5 days to seek a review of this decision. 47 C.F.R. § 0.459. The American Distance Education Consortium shall have 14 days from date it receives the information to submit a response for our review, EchoStar shall have 10 days to submit a reply and ADEC shall have 5 days to address EchoStar's reply.

24. IT IS FURTHER ORDERED, that the attached Protective Order IS ADOPTED.

25. IT IS FURTHER ORDERED, that EchoStar shall keep an accurate account of all costs incurred in providing the American Distance Education Consortium's public interest programming.

26. IT IS FURTHER ORDERED, that the American Distance Education Consortium's request that EchoStar be ordered to negotiate directly with the American Distance Education Consortium on matters concerning potential access to EchoStar's satellite IS DENIED. EchoStar is permitted to use a third party agent or clearinghouse to select among qualified programs to be aired on the set-aside capacity.

27. IT IS FURTHER ORDERED, that the International Bureau shall promptly telefax a copy of this Order to the American Distance Education Consortium and to EchoStar Satellite Corporation.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

ATTACHMENT A

Commenters:

Iowa State University, North Central Regional Center for Rural Development
Colorado State University, Office of the Provost and Academic Vice President, and
Dean, College of Agricultural Sciences
University of Georgia, College of Agricultural and Environmental Sciences
University of Illinois at Urbana-Champaign, College of Agricultural, Consumer and
Environmental Sciences
North Carolina Agricultural and Technical State University
University of Maryland, College of Agriculture and Natural Resources
Tuskegee University, College of Agriculture, Environmental and Natural Sciences
University of Kentucky, College of Agriculture
University of Arizona, College of Agriculture
Purdue University, Dean of Agriculture
The Ohio State University, College of Food, Agriculture and Environmental Sciences
University of Wisconsin – Extension
University of Florida, Institute of Food and Agricultural Sciences
Utah State University, Office of the President
Oregon State University, College of Agricultural Sciences
National 4-H Council
Alliance for Community Media
Los Angeles County Office of Education
Independent Television Service
University of Nebraska Lincoln, Institute of Agriculture and Natural Resources
Diné College, Office of the President
Clemson University, Public Service and Agriculture
University of California, Director, Agriculture and Natural Resources and
Communication Services

ATTACHMENT B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
American Distance Education Consortium)	File No. SAT-PDR-19990803-00077
Request for an Expedited Declaratory Ruling)	
And Informal Complaint)	
)	

PROTECTIVE ORDER

Adopted: November 23, 1999

Released: November 24, 1999

This Protective Order is intended to facilitate and expedite the review of documents containing trade secrets and commercial or financial information obtained from EchoStar Satellite Corporation ("EchoStar") and which is privileged or confidential.¹ It reflects the manner in which "Confidential Information," as that term is defined herein, is to be treated. This Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

1. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph seven.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets or commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information; and (iii) information that the Commission has allowed to be examined off-site and that otherwise complies with the requirements of this paragraph. Confidential Information includes additional copies of and information derived from Confidential Information.

¹ EchoStar Satellite Corporation is a subsidiary of EchoStar Communications Corporation. These entities are referred to collectively as "EchoStar."

- d. Declaration. "Declaration" means Appendix A to this Protective Order.
- e. Reviewing Party. "Reviewing Party" means the American Distance Education Consortium ("ADEC").
- f. Submitting Party. "Submitting Party" means EchoStar.

2. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 1 of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R §§ 0.459 & 0.461, determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

3. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, "CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by EchoStar from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, EchoStar shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

4. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

5. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Party, ADEC, or if ADEC has no counsel, to a person designated by ADEC. Before counsel to ADEC or such other designated person designated by ADEC may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to the Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement or if they execute the attached Declaration.

6. Counsel to ADEC or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

7. Authorized Representatives shall be limited to:

- a. Counsel for the Reviewing Parties to this proceeding, including in-house counsel actively engaged in the conduct of this proceeding, and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;
- b. Specified persons, including members of ADEC, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; or
- c. Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.

8. Inspection of Confidential Information. Confidential Information shall be maintained by EchoStar for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice (generally not to exceed one business day) during normal business hours.

9. Copies of Confidential Information. EchoStar shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty-five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to EchoStar upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly secured at all times.

10. Filing of Declaration. Counsel for ADEC shall provide to EchoStar and the Commission with a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed.

11. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review) unless otherwise ordered by the Commission or a court of competent jurisdiction, shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

12. Pleadings Using Confidential Information. EchoStar and ADEC may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

- a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

- b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;
- c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint, File No. SAT-PDR-19990803-00077;" and
- d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, EchoStar, and those ADEC representatives that have signed the attached Declaration. Such confidential portions shall be served under seal. They shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to EchoStar and an opportunity to comment on such proposed disclosure). If EchoStar or ADEC file a pleading containing Confidential Information, they shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. EchoStar or ADEC may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notation required by subsection c of this paragraph is not removed.

13. Violations of Protective Order. Should ADEC, after it has properly obtained access to Confidential Information under this Protective Order, violate any of its terms, it shall immediately convey that fact to the Commission and to EchoStar. Further, should such violation consist of improper disclosure or use of Confidential Information, ADEC shall take all necessary steps to remedy the improper disclosure or use. ADEC shall also immediately notify the Commission and EchoStar, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to EchoStar at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

14. Termination of Proceeding. Unless otherwise ordered by the Commission or a court of competent jurisdiction, within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of ADEC shall destroy or return to EchoStar all Confidential Information as well as all copies and derivative materials made. Authorized Representatives shall certify in a writing served on the Commission and EchoStar that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to ADEC may retain two copies of pleadings submitted on behalf of ADEC and other attorney work product. Any confidential information contained in any copies of pleadings retained by counsel to ADEC or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 9 and 11 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

15. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by EchoStar of any privilege or entitlement to confidential treatment of such Confidential Information. ADEC, by viewing these materials: (a) agrees not to assert any such waiver; (b) agrees not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agrees that accidental disclosure of Confidential Information shall not be deemed a waiver of any privilege.

16. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of EchoStar to apply for additional or different protection where it is deemed necessary or to the rights of ADEC to request further or renewed disclosure of Confidential Information.

17. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, American Distance Education Consortium executing the attached Declaration, and the Submitting Party, EchoStar Communications Corporation.

18. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

APPENDIX A

DECLARATION

In the Matter of)
)
American Distance Education Consortium) File No. SAT-PDR-19990803-00077
Request for an Expedited Declaratory)
Ruling and Informal Complaint)
)

I, _____, hereby declare under penalty of perjury that I have read the Protective Order in the above referenced proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with EchoStar Satellite Corporation, the Submitting Party.

(Signed) (Date)

(Printed name)

(Representing)

(Title)

(Employer)

(Address)

(Phone)